

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Jerry Pierce,

Complainant,

vs.

Mayor Tim Howe, City of Coon Rapids,
Respondent.

**ORDER FINDING
NO PRIMA FACIE VIOLATION AND
DISMISSING COMPLAINT**

TO: Parties.

On August 20, 2012, Jerry Pierce filed a Campaign Complaint with the Office of Administrative Hearings alleging that Coon Rapids Mayor Tim Howe violated Minnesota Statutes § 211B.06 in connection with the August 14, 2012, primary election for Coon Rapids City Council Ward 1.

The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge on August 20, 2012, pursuant to Minn. Stat. § 211B.33. A copy of the Complaint was sent by United States mail to the Respondent on August 21, 2012.

After reviewing the Complaint and the attached documents, and for the reasons set out in the attached Memorandum, the Administrative Law Judge finds that the Complaint fails to set forth a *prima facie* violation of the Fair Campaign Practices Act.

ORDER

IT IS ORDERED:

That the Complaint filed by Jerry Pierce against Coon Rapids Mayor Tim Howe is **DISMISSED**.

Dated: August 23rd, 2012

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this Order is the final decision in this matter. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

The Complainant, Jerry Pierce, was one of three candidates for Coon Rapids City Council Ward 1 in the August 14, 2012 primary election. He received approximately 14% of the vote. The other two candidates, Denise Klint and Chad Newman, received approximately 53% and 34% of the vote, respectively. Mr. Pierce did not advance to the November 2012 general election.

The Complaint alleges that the mayor of Coon Rapids, Tim Howe, made oral statements regarding Mr. Pierce that were designed to damage Mr. Pierce's campaign for City Council. The Complaint contends that, by making these statements, Mayor Howe violated Minn. Stat. § 211B.06, which prohibits the preparation or dissemination of false campaign material.

According to the Complaint, the City of Coon Rapids holds "open mic" sessions during monthly City Council meetings where citizens may submit written questions or comments. These written questions or comments are not televised, but the mayor's responses to them are televised at a later date on a local public-access cable television program. The Complainant alleges that he submitted written questions at the July 17, 2012, open mic session of the Coon Rapids City Council meeting. According to the Complainant, one of the questions he asked was: "Would the city be willing to meet for a debate regarding the accomplishments of full time city employees over the last 6 years?"¹

The Complaint asserts that on August 8, 2012, Mayor Howe responded to Mr. Pierce's question during a televised broadcast by stating the following:

Our first open mic report is from a Jerry Pierce of [address]. And he had questions about a debate, open mic and construction issues. Staff has reported mentioned [sic] that the council has responded in the past to Mr. Pierce's concerns regarding a council debate and open mic procedures. ... Mr. Pierce has gotten up on several occasions and discussed about [sic] having a debate. We have a city of 60,000 people, so if somebody wanted to debate an issue or as he says – debate the council's report cards – will be counter-productive and not something that, in my opinion,

¹ Complaint at 2. See Ex. A (Exhibit A appears to be the written questions Mr. Pierce submitted to the Council on July 17, 2012. The question as it appears on Exhibit A reads: "Mayor, have you set a date for the DEBATE we are requesting the REPORT CARDS.")

[people] are interested in. **Now Mr. Pierce is a candidate for City office, so maybe this is his motive in this particular issues.** [sic] ...²

The Complaint alleges that Mayor Howe's suggestion that Mr. Pierce's request for a debate may be politically motivated damaged his campaign.

Standard of Review

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.³ For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.⁴ A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.⁵

Minnesota Statutes § 211B.06 - False Campaign Material

Minn. Stat. § 211B.06 provides in relevant part:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In order to be found to have violated Minn. Stat. § 211B.06, a person must intentionally participate in the preparation or dissemination of campaign material that the person knows is false or communicates with reckless disregard of whether it is false. Campaign material is "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election."⁶

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact and not against unfavorable deductions or inferences based on fact.⁷ Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is

² Complaint cover letter, marked as Ex. C. (Emphasis supplied by Complainant.)

³ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

⁴ *Id.*

⁵ *Id.*

⁶ Minn. Stat. § 211B.01, subd. 2.

⁷ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

true in substance, inaccuracies of expression or detail are immaterial.⁸ Finally, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.⁹

To prove a violation at the hearing, the Complainant must show that the statement is substantively false and that the person who prepared, disseminated or broadcast the statement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.¹⁰ Based on this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.¹¹

The Complainant’s allegation that Mayor Howe violated Minn. Stat. § 211B.06 with respect to statements he made during his televised response to the open mic questions fails for several reasons. First, the definition of “campaign material” is limited to written material. Oral statements (other than paid political advertising) such as those made by Mayor Howe on the cable television program fall outside of the definition and cannot form the basis of a claim under Minn. Stat. § 211B.06.¹²

Second, the statement identified by the Complainant as damaging to his “election campaign” is not factually false and instead reflects only Mayor Howe’s opinion. Mayor Howe’s speculation that Mr. Pierce’s call for a debate may be politically motivated based on his candidacy for City Council is at most an unfavorable deduction or opinion and cannot form the basis of a § 211B.06 complaint. The statute does not bar unfavorable criticisms or deductions even if misleading, unfair or incomplete.¹³ Absent some evidence that a particular statement was demonstrably factually false and was disseminated with a high degree of awareness of its probable falsity, the claim fails to allege a *prima facie* violation of Minn. Stat. § 211B.06 and must be dismissed.

⁸ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

⁹ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing* *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

¹⁰ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹¹ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also* *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied* (Minn. 2006).

¹² *See, Stegner v. Smith*, 2008 WL 2967011 at *4 (Minn. App.) (concluding that oral statements do not constitute “campaign material” within the meaning of § 211B.01); *Stegner v. Smith, et al*, OAH Docket No. 11-6381-19135-CV (2007); *Koalska v. Juneau*, OAH Docket No. 7-6312-16225-CV (2004).

¹³ *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which “told only one side of the story,” or were merely “unfair” or “unjust,” without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

For the reasons stated above, the Complaint is dismissed in its entirety.

R.C.L.